In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 512

SCOTT PUBLISHING CO., INC.,
Petitioner,
vs.
COLUMBIA BASIN PUBLISHERS, INC.; HOWARD PARISH AND ASSOCIATES, INC.; HOWARD W. PARISH; JAMES M. BRYCE; KENNEWICK-PASCO TYPOGRAPHICAL UNION NO. 831; UNITYPO, INC.; INTERNATIONAL TYPOGRAPHICAL UNION; WOODRUFF RANDOLPH; DON HURD; WALTER D. MARVICK; CHARLES M. LYON; HAROLD H. CLARK; JOE BAILEY; FRANCIS E. McGLOTHLIN; A. L. WILIE; SEATTLE TYPOGRAPHICAL UNION NO. 202; and ALLIED PRINTING TRADES COUNCIL OF SEATTLE,
Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Significantly, the respondents before this court fail to deny the motives and joint acts which constitute a violation of the law, but seek to avoid the law by reliance upon an argument which has been judicially labeled as "too specious to merit discussion." The merits of the petition are thus reemphasized by respondents' eloquent silence concerning the pertinent issues and facts.

Respondents apparently concede that the first two questions as stated by petitioner (Petition for Writ of Certiorari, pp. 2, 3) arise out of the facts of this case; their contention is that petitioners may not properly raise these issues before this court, a proposition which will be discussed below.

Likewise unchallenged except by the plea of avoidance are the following key facts:

1. The newspaper respondents at all times intended to force petitioner to merge with Columbia Basin Publishers, Inc. (Petition for Writ of Certiorari, pp. 6 and 16 through 20.)

2. The Union respondents either intended to replace petitioner with a so-called "fair publisher" or intended to take away petitioner's business, if that could be done, in order to force petitioner to capitulate to the Union's demands. (Petition for Writ of Certiorari, pp. 20-22.)

3. The Union respondents' financing of the newspaper respondents' losses in an amount in excess of $2,000,000 could not be considered a legitimate business transaction. (Petition for Writ of Certiorari, pp. 6-7.)

4. The Union and the newspaper respondents cooperated and combined to cancel subscriptions to the Herald, to deprive the Herald of national and local advertising, and to operate the Columbia Basin News. Joint boycotts were an integral part of this cooperative effort. (Petition for Writ of Certiorari, pp. 9-12.)

Respondents refer generally to the opinions of the courts below as being of assistance to them. This suggestion is subsequently clarified, however, when respondents cite the opinions below as establishing only that there was no prestrike conspiracy. In other words, respondents make the analysis, which is correct, that the courts below focused

on the events prior to March 3, 1950, the date of the strike, and, having found no prestrike conspiracy, did not consider the legality or illegality of any combination and cooperation which developed after the strike had occurred. The accuracy of this analysis is confirmed by the failure of both the trial court and the Court of Appeals even to discuss the issue of joint boycotts arising after March 3, 1950, although this issue was raised by the pleadings, facts, and arguments of counsel. (See Petition for Writ of Certiorari, p. 14.) The opinion of the District Court is described by respondents as follows (Brief in Opposition to Petition for Writ of Certiorari, p. 8.):

> "He described the conspiracy charged * * * and held that while there was evidence of poststrike cooperation between Columbia Basin Publishers and Local 831, that cooperation, being consistent with the separate lawful purpose of each of those defendants, was not, of itself, proof of a prestrike conspiracy to obtain a monopoly between Parish-Bryce and Columbia Basin Publishers on the one hand, and Local 831 on the other * * * *"

Thus, both the District Court and the Court of Appeals examined the prestrike events, and having found no conspiracy by either side during this period, failed to analyze the legal effect of respondents' poststrike joint activity. The defense by respondents here, as it was before the Court of Appeals, is that petitioners are precluded from raising the illegal poststrike combination in violation of Section 1.

The argument of respondents that petitioner is foreclosed on appeal from showing a violation of Section 1 is without foundation in fact or law.

Respondents seek to perpetuate the error induced by them in the courts below. Because of certain allegations that the conspiracy extended from prior to March 3, 1950,

the date of the strike, to the date of trial, respondents persuaded the courts below that if the conspiracy did not commence prior to March 3, 1950, no further consideration of legality was necessary. Thus, at respondents' urging, the courts below did not consider the possibility of illegal conspiracy or combination commencing after March 3, 1950, and operating during a portion of the period in issue. In view of the unchallenged facts and issues, this attempted avoidance by respondents is crucial to them.

Respondents rely upon the criminal law concepts, that a party may not vary from the conspiracy alleged. But even in the more strict field of criminal law, numerous decisions have held that allegations of a conspiracy covering a longer period encompass a proof of a conspiracy within that period. An illustrative case is *United States v. Postma*, 242 F.2d 488 (2d Cir. 1957), *cert. denied*, 354 U.S. 922 (1957), wherein the Court of Appeals for the Second Circuit rejected the contention that proof that the conspiracy started in November 1952 (rather than in June 1951 as alleged) was a fatal variance, saying, "the conspiracy proved fell within the period charged." The argument of fatal variance was labeled "too specious to need discussion." See also: *Remus v. United States*, 291 Fed. 501 (6th Cir. 1923), *cert. denied*, 263 U.S. 717 (1924); *Bradford v. United States*, 152 Fed. 617 (5th Cir. 1907), *cert. denied*, 206 U.S. 563 (1907).[1]

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1. There is likewise no question that the respondents were put on notice of an alleged Section 1 violation subsequent to the strike. Paragraph 1 of the complaint notes a violation of both Sections 1 and 2 (R. 4). Paragraph 25 alleges both a contract, combination and conspiracy in restraint of trade (a Section 1 violation), and an attempt to monopolize and combination to monopolize (which is both a Section 1 and 2 violation) (R. 45). Paragraph 4(g) charges that joint boycott activities of the defendants caused the discontinuance of advertising and the loss of substantial numbers of readers and subscribers (R. 9 and 10). The paragraph then goes on to note that such activities violate the law in several respects as un-

In any event, appellees cannot assert that they were surprised by the proof introduced at the trial or that their substantial rights have been affected in any respect.[2]

Respondents Discriminated in Price in the Sale of Advertising in Violation of the Robinson-Patman Act.

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reasonable restraints (a Section 1 violation) and as an attempt to foster a monopoly (a Section 2 violation) (R. 9-10). Paragraph 6 (a) notes that the activities deprive the Herald of "normal operating revenue and/or forced them out of business" (R. 12). Paragraphs 12(c) and 13 (R. 24-25, 26-27) described in minute detail the cooperative efforts, including the urging of group boycotts, sponsoring of joint radio programs, and the contacting of advertising agencies to intimidate them to refrain from placing advertising in the Herald. A more specific allegation of group boycotts in violation of Section 1 is difficult to imagine. Paragraph 18 spells out in detail the cooperative efforts of appellees to secure group boycotts by subscribers to the Herald (R. 37-38). Contrary to respondents' assertion, there was no pretrial order limiting the issue in the instant action. There was only an exchange and filing of statements by opposing counsel. But again, in its pretrial statement, petitioner spelled out clearly that it sought to prove a violation of Section 1 by reason of the cooperative activities of respondents as well as a conspiracy to monopolize in violation of Sections 1 and 2. Paragraphs 1 and 2 of "Brief Statement of What Plaintiff Intends to Prove" clearly set forth a violation of Section 1 of the Sherman Act by combination or by conspiracy. Paragraphs 3 and 4 spell out the additional violations of attempt and conspiracy to monopolize (Resp. Br. Appendix 69A-70A). Paragraph 12 (a) again shows petitioner's asserting a Section 1 "cooperative effort" in restraint of trade, as well as an attempt to monopolize and combination and conspiracy to monopolize (Resp. Br. Appendix 71A). In paragraphs 13 and 14 petitioner describes the effect of the illegal acts of respondents in terms of both a Section 1 violation (paragraph 13) and a Section 2 violation (paragraph 14) (Resp. Br. Appendix 72A). The illegal joint activities which caused such violation are again described in detail in the pretrial statement (Resp. Br. Appendix 79A-82A).

2. Even if the specific allegations of the complaint and the pretrial statement are overlooked, it would have been error for the trial court below to have refused to permit appellant to amend to conform to the proof and plead a violation of Section 1. *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, 212 F.2d 840 (2d Cir. 1954); *Hasselbrink v. Spellman*, 246 F.2d 34 (6th Cir. 1957). Compare: *Berger v. United States*, 295 U.S. 78 (1935); *Schefano v. United States*, 84 F.2d 513 (5th Cir. 1936).

Respondents' discussion of price differences is inconsistent and confusing. Respondents not only fail to clarify what the courts below decided but further muddled the issue taking contradictory positions. For example, at one point (footnote 16 on page 16, of Respondents' Brief in Opposition to Petition for Writ of Certiorari) respondents suggest that they convinced the trial court that there were no price differences, and that the court decided the question of price differences against the petitioners. In footnote 17, however, respondents maintain that neither the trial court nor the circuit court reached the question of price differences which they label as a "pointless exercise".[3]

A history of respondents' shifting positions on the question of price differences may bring some clarification to the problem.

Before the trial court, the respondents sniped at the extensive documentary evidence offered by the petitioners to prove price differences by noting a few clerical errors and by questioning whether or not a monthly comparison could be made. The vast bulk of the statistics introduced were unchallenged by respondents as would be expected since the information was derived from the files of the Columbia Basin News.[4]

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3. Respondents mention, without record references, a series of alleged factors including alleged cost savings as reasons for the failure to consider the price differences. The alleged cost savings were neither pleaded, proved, urged nor even suggested by the respondents until the filing of this brief. Such an unfounded position reveals a desperate attempt to avoid having this Court examine the Robinson-Patman Act question.

4. The assertion by respondents in footnote 16 (Resp. Brief, p. 16) that petitioner's exhibits of price differences, which were prepared by a certified public accountant, were vigorously attacked as to accuracy, truth and underlying assumption is not in accord with the record as demonstrated by respondents' record references. Certain references establish that the price preferences deviated from the published rate cards; that such preferences differed as among

Respondents led the trial court into believing that so long as the rate card was followed there was no violation of the Robinson-Patman Act (Appendix to Petition, p. 50). The trial court without examining the documentary evidence, found that the rate card was followed after 1951 (which was clear error) and ignored the more vital question of whether or not the rate card itself violated the Robinson-Patman Act since it was replete with quantity discounts.

Before the Court of Appeals in the face of the documentary record before that court, respondents shifted positions and did not deny price differences but focused upon the requisite competitive effect. In the appellees' brief in opposition to petition for rehearing (page 5), for example, they state:

> "In its petition for rehearing, appellant urges, as it did before (App. Brief 82) that the trial court 'found contrary to the evidence, that there were no price differences (R. 166)' (Pet. 4-5). We say now, as we said before (Appellee's Brief 81-82), that the trial court did no such thing."

Respondents then turned to a discussion of competitive injury. Thus, before the Court of Appeals the contention apparently was that the trial court found price differences but found no requisite competitive injury.

Before this Court, ignoring the documents and records

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purchasers of similar quantities of advertising is apparent on the exhibit (Tr. 3635; Petitioners' Brief, Appendix F). Another citation refers to minor clerical errors (Tr. 5858). The remaining references refer to the contention of respondents before the trial court that if there was a yearly contract setting forth the preferential price, such price difference was somehow justified notwithstanding the fact that other purchasers were charged at a higher rate (Tr. 3675, 5602, 5626, 5630-35, 5735-60). The fact that a quantity discount may have been reduced to writing is but more reliable proof of violation when combined with the requisite competitive injury.

described in Appendix F to the Petition for Writ of Certiorari and ignoring their position before the Court of Appeals, respondents state that the trial court examined the documents and found that there were no price differences (Resp. Brief, p. 16, fn. 16).

In truth, the evidence of price differences is overwhelming, and the trial court was in clear error in not finding such differences (Appendix F to Petition for Writ of Certiorari).[5] The Court of Appeals considered only limited factors relating to the requisite competitive effect, an issue which was not reached by the trial court. The extent and nature of such price differences were concededly not determined by the Court of Appeals (Resp. Brief, p. 18, fn. 17.) which decided the issue of competitive effect in a vacuum without reference to legal and economic criteria defined by this Court. The decision of the Court of Appeals represents a denial of petitioner's right to a day in court on this issue. Facts concerning the close approach of the News to the Herald in circulation during the crucial 1951 to 1955 period,

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5. Respondents oblique suggestions that questions of credibility govern the Robinson-Patman Act issue is without foundation. The essential facts upon which the Robinson-Patman violation is based are undisputed (*supra* at p. 6). Furthermore, in the rare instances of conflicting testimony, the trial court accepted the testimony of petitioner's witnesses. For example, defense counsel strenuously urged that the meeting described by Phillip and Lee of Scott Publishing Company wherein Parish threatened to force their business to the wall and buy them out at 5¢ on the dollar, did not take place. The trial court found, however, that the discussion occurred in 1949 as stated by Phillip and Lee. (Tr. 2840-41, 206-07.) Compare also the preluncheon testimony of a key defense witness (Tr. 4439) with his postluncheon testimony (Tr. 4552-55). Indeed, the trial court, in discussing the Section 2 charge, attempted to temper the unequivocal declarations of exclusionary purpose and intent expressed in numerous communications from newspaper respondents to Union respondents by euphemistically labelling such declarations as a "sales pitch to their financial angel." (Petition for Writ of Certiorari, Appendix B, p. 47.) In the context of credibility such activity, if true, would be described more accurately with a much stronger word.

the precarious financial position of the Herald during this period, and the substantial diversion of advertising from the Herald because of such price differences, requires analysis by the trier of fact.

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Respectfully submitted,

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